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## PATENT

*Ex Parte* Douglas R. Stewart

Applicant: Ronald R. Weiss  
Serial No.: 10/689,397  
Filed: October 20, 2003  
Group Art Unit: 1761  
Confirmation No.: 2876  
Examiner: Becker, Drew E.  
Title: **CONTROL METHODS FOR POPPING POPCORN**  
Attorney Ref. No.: GME-131C

March 26, 2007

**APPEAL BRIEF**

This brief is in furtherance of Appellant's Notice of Appeal filed September 26, 2006, appealing the decision of the Examiner dated April 26, 2006, finally rejecting claims 26-29 (all pending claims). A copy of the claims appears in the Claims Appendix to this brief.

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**I. Real Party In Interest**

The real party in interest in this appeal is Gold Medal Products Company, a corporation of Ohio having a place of business at 10700 Medallion Drive, Cincinnati, Ohio 45241.

**II. Related Appeals and Interferences**

There are no related appeals or interferences known to Appellant, the Appellant's legal representative, or to the assignee which will directly affect or be directly affected by or have a bearing on the decision of the Board in the present appeal.

### **III. Status of Claims**

Claims 26-29 remain pending after the final rejection dated April 26, 2006, and are subject to this appeal. Claims 1-25 have been previously canceled without prejudice or disclaimer.

Claims 26-29 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-18 of U.S. Patent No. 6,534,103 (the “103 patent”).

Claims 26-29 also stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-6 of U.S. Patent No. 6,352,731 (the “731 patent”).

Lastly, claims 26-29 stand rejected under 35 U.S.C. §103(a) as being unpatentable over VandeWalker, U.S. Patent No. 4,182,229 in view of Cartwright et al., U.S. Patent No. 5,352,866.

**IV. Status of Amendments**

There are no amendments pending after the final rejection of this application.

**V. Summary of Claimed Subject Matter**

Claim 26 is the only independent claim on appeal.

Independent claim 26 recites a method of popping corn in a plurality of batches from batches of corn and oil loaded into a kettle (18), beginning with a cold start batch and then subsequent batches. For a cold start batch, the method comprises the steps of applying heat to the kettle (18) without PID temperature control to pop the popping corn of the cold start batch within the kettle (18). For a subsequent batch (i.e., batches following the cold start batch), the method comprises the steps of applying heat to the kettle with PID temperature control to pop the popping corn of the subsequent batch within the kettle (see Page 76, line 17 through Page 87, line 10, of Appellant's disclosure, for example, and Figs. 15 and 16).

According to the recited method of independent claim 26, heat is applied to the kettle without PID temperature control for a cold start batch to pop the popping corn of the cold start batch within the kettle. For subsequent batches, heat is applied to the kettle with PID temperature control to pop the popping corn of the subsequent batch within the kettle. The PID features are overridden for at least the first cooking cycle, i.e., the cold start batch, so that the kettle temperature may ramp up toward a temperature which may be essentially a high limit temperature. This allows the kettle and other heated components of the system to approach thermal equilibrium for cooking subsequent batches of corn. During a subsequent cooking cycle, the PID features are enabled and the system is then under control of the PID features so that the kettle heater may be controlled to deliver heat to the kettle to keep an empty kettle around a desired temperature set point. Accordingly, for a cold batch start, the kettle is heated

without use of the PID temperature control so that the kettle and other heated components are allowed to approach thermal equilibrium. For subsequent batches, the kettle is heated with the use of PID temperature control since the kettle and other heated components are generally at thermal equilibrium (see Page 78, line 14 through Page 79, line 19).



**VI. Grounds of Rejection to be Reviewed on Appeal**

A. The rejections of claims 26-29 under the judicially created doctrine of obviousness-type double patenting as being patentable over claims 1-18 of U.S. Patent No. 6,534,103.

B. The rejections of claims 26-29 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-6 of U.S. Patent No. 6,352,731.

C. The rejections of claims 26-29 under 35 U.S.C. §103(a) as being unpatentable over VandeWalker, U.S. Patent No. 4,182,229 in view of Cartwright et al., U.S. Patent No. 5,352,866.

## **VII. Argument**

### **A. The Rejections of Claims 26-29 Under the Judicially Created Doctrine of Obviousness-Type Double Patenting Over U.S. Patent No. 6,534,103**

Examiner takes the position that independent claim 26 of the present application is of a broader scope than claim 7 of the '103 patent and thus the instant claims essentially read on the invention defined by the '103 patent claims. However, Appellant respectfully submits that is not the case.

Claim 7 of the '103 patent is directed to a method of popping a plurality of popcorn types in the same kettle by changing the kettle temperature depending on the popcorn type (i.e., salted popcorn or sugar coated popcorn). The present claims, in contrast, are directed to a method for controlling the kettle heat between a cold start batch and subsequent batches of the same popcorn type by overriding the PID temperature control during the cold start batch and then applying heat to the kettle with PID temperature control for subsequent batches.

Accordingly, Appellant respectfully submits that the subject matter recited in claims 26-29 of the present application is not obvious over claims 1-18 of the '103 patent and the obviousness-type double patenting rejections should be reversed.

### **B. The Rejections of Claims 26-29 Under the Judicially Created Doctrine of Obviousness-Type Double Patenting Over U.S. Patent No. 6,352,731**

Examiner takes the position that independent claim 26 of the present application is of a broader scope and claim 3 of the '731 patent and thus the instant claims essentially read on the invention defined by the '731 patent claims. Appellant respectfully traverses Examiner's position.

Claim 3 of the '731 patent is directed to delivering heat energy to a cold kettle until a first temperature has been reached and, for subsequent batches, reducing the delivery of heat energy to the kettle when a temperature lower than the first temperature is reached. The claims of the '731 patent do not teach or suggest a kettle heating method including applying heat to the kettle without PID temperature control for a cold start batch and, for subsequent batches, applying heat to the kettle with PID temperature control as claimed by Appellant.

Accordingly, Applicant respectfully submits that the subject matter recited in claims 26-29 is not obvious over claims 1-6 of the '731 patent and the obviousness-type double patenting rejection should be reversed.

**C. The Rejections of Claims 26-29 Under 35 U.S.C. §103(a) as being Unpatentable Over VandeWalker, U.S. Patent No. 4,182,229 in View of Cartwright et al., U.S. Patent No. 5,352,866**

Claims 26-29 stand rejected under 35 U.S.C. §103(a) as being unpatentable over VandeWalker in view of Cartwright et al. Appellant respectfully submits that these rejections should be reversed for the reasons set forth below.

“To establish a *prima facie* case of obviousness, three basic criteria must be met. First there must be some suggestion or motivation either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine the reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all of the claim limitations.” MPEP §2143. To establish a *prima facie* obviousness of a claimed invention, all of the claim limitations must be taught or

suggested by the prior art. In re Royka, 180 USPQ 580 (CCPA 1974). The mere fact that elements of a claimed invention are known in the art is not, of itself, sufficient basis for an obviousness rejection. In re Katzab, 55 USPQ 2d 1313 (Fed. Cir. 2000); MPEP §2143.01. Rather, there must be some motivation, teaching or suggestion in the prior art to make the combination, either explicitly or implicitly. “The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification.” In re Fritch, 23 USPQ 2d 1780, 1783-84 (Fed. Cir. 1992).

Appellant respectfully submits that the rejections of claims 26-29 should be reversed because the combination of VandeWalker and Cartwright et al. fails to teach or suggest the combination of steps recited in independent claim 26, including the steps of applying heat to the kettle without PID temperature control for a cold start batch and, for a subsequent batch, applying heat to the kettle with PID temperature control to pop the popping corn of the subsequent batch within the kettle.

The primary VandeWalker reference is directed to a popcorn popping machine that uses a heater to heat the kettle to a popping temperature set through a variable resistor. Upon reaching that temperature, a sensor and triac control the flow of current through the heater to maintain the set popping temperature. Examiner properly recognizes that VandeWalker is completely silent with respect to the use of PID temperature control for applying heat to a kettle of a popcorn popping machine.

The secondary Cartwright et al. reference is directed to an oil fryer that incorporates PID control to control the temperature of oil within the oil vat. However, in Cartwright et al., the PID temperature control is used in each cooking cycle so that

Cartwright et al. is completely silent with respect to heating of the oil within the vat without PID temperature control during a cold start batch and, for subsequent batches, applying heat to the oil vat with PID temperature control. Rather, Cartwright et al. teaches the use of PID temperature control during each cooking cycle.

Examiner takes the position in the Advisory Action mailed August 2, 2006 that one of ordinary skill in the art would be motivated to incorporate the PID temperature control of Cartwright et al. in the popcorn popping machine of VandeWalker. However, the Examiner's position fails to address why one of ordinary skill in the art would be motivated to modify the PID temperature control of Cartwright et al. to override the PID temperature control during a first cooking cycle as recited in the instant claims.

Appellant respectfully submits that the hypothetical combination of VandeWalker and Cartwright et al. fails to achieve Appellant's claimed invention as recited in independent claim 26 since the hypothetical combination would result in the use of PID temperature control for each batch, including the cold start batch.

Appellant respectfully submits that the prior art of record fails to teach or suggest heating of the kettle without PID temperature control for a cold start batch and with PID temperature control for a subsequent batch as recited in independent claim 26.

Accordingly, the Examiner's rejections of claims 26-29 should be reversed.

### **CONCLUSION**

For the reasons stated, Appellant respectfully urges the Board to reverse the rejections of claims 26-29.

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## Claims Appendix

1-25. CANCELED.

26. (PREVIOUSLY PRESENTED) A method of popping corn in a plurality of batches from batches of corn and oil loaded into a kettle, beginning with a cold start batch and then subsequent batches, including the steps of:

for a cold start batch, applying heat to the kettle without PID temperature control to pop the popping corn of the cold start batch within the kettle; and

for a subsequent batch, applying heat to the kettle with PID temperature control to pop the popping corn of the subsequent batch within the kettle.

27. (PREVIOUSLY PRESENTED) The method of claim 26 wherein the kettle heats to proximate a maximum first temperature without PID temperature control during a cold batch start.

28. (PREVIOUSLY PRESENTED) The method of claim 27 wherein the kettle heats to proximate a maximum second temperature with PID temperature control during a subsequent batch.

29. (PREVIOUSLY PRESENTED) The method of claim 28 wherein the first maximum temperature is higher than the second maximum temperature.

30. (WITHDRAWN)        A method of popping corn in a plurality of batches from batches of corn and oil loaded into a kettle, beginning with a cold start batch and then subsequent batches, including the steps of:

for a cold start batch, applying heat to the kettle so that the kettle reaches a thermal equilibrium during the popping cycle of the cold start batch to pop the popping corn of the cold start batch; and

for subsequent batches, popping the popping corn of the subsequent batches while the kettle has obtained thermal equilibrium.



## **Evidence Appendix**

None

## **Related Proceedings Appendix**

None